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In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. LESTER, JR., AND
SUE FURGER LESTER, PETITIONERS

v.

LAURA ANDERSON, EXECUTRIX OF THE
ESTATE OF R.C. ANDERSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Section 125(a) of the Truth in Lending Act (15 U.S.C. 1635(a)) grants a right of rescission to a consumer in certain credit transactions. Section 125(b) of the Act (15 U.S.C. 1635(b)) provides that when the consumer exercises his right to rescind, the creditor is required to return to the consumer all monies received and terminate any security interest arising from the credit transaction. The consumer is thereupon required to tender the loan proceeds back to the creditor.

The questions presented are:

1. Whether a creditor who does not return all monies received from a rescinding consumer forfeits his right to recover the loan proceeds from the consumer where the consumer fails to tender the loan proceeds back to the creditor.

2. Whether a creditor in such circumstances is liable to the consumer for actual damages, civil penalties, and attorney's fees.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

A. The Statute

The Truth in Lending Act (15 U.S.C. 1601 *et seq.*, the "Act") provides that a consumer who enters a credit transaction in which the creditor obtains a security interest in the consumer's home may rescind the transaction within three days after it is consummated (15 U.S.C. 1635(a)). In addition to the disclosures the Act requires in all consumer credit transactions,[1] Section 1635(a) requires the creditor to

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[1]See 15 U.S.C. 1639 and Regulation Z (12 C.F.R. 226.8).

disclose that the consumer has the right to rescind a transaction that is subject to that provision. If the creditor does not disclose the consumer's right to rescind at the time the transaction is consummated, the consumer has the right to rescind until the creditor makes the required disclosure, but that right expires three years after consummation (Section 1635(a), (f)). The consumer may exercise his right to rescind by notifying the creditor of his intention to rescind (Section 1635(a)).

Section 1635(b) sets forth the procedures that apply when a consumer exercises his right to rescind, and "is designed to restore the parties to the status quo as closely as possible." *Bustamante* v. *First Federal S. & L. Ass'n*, 619 F. 2d 360, 365 (5th Cir. 1980). When the consumer notifies the creditor of his intention to rescind, he is no longer liable for any finance charge and the security interest in his home becomes void. Section 1635(b) then requires the creditor, within ten days after receiving the notice of rescission, to return all money received from the consumer and to take all necessary action to terminate any security interest created by the transaction. Upon the creditor's performance of these obligations, the consumer is required to tender any property received from the creditor. If the creditor does not take possession of the property within ten days of the tender, ownership of the property vests in the consumer and he is not obliged to pay for it.

The Act specifies the remedies and civil penalties that may be awarded against creditors who violate its provisions. 15 U.S.C. 1640.[2] The creditor who fails to comply with the Act's requirements is liable to the consumer for

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[2]The Act also imposes criminal liability for willful violations (see 15 U.S.C. 1611). That provision, however, is not involved here.

actual damages resulting from the failure (Section 1640(a)(1)), a civil penalty of twice the amount of the finance charge (not less than $100 or more than $1,000) (1640(a)(2)), and in a successful action to enforce the liability Section 1640(a) imposes, attorney's fees and costs (Section 1640(a)(3)). Any action to enforce the liability Section 1640(a) creates must be brought within one year from the date of the violation. 15 U.S.C. 1640(e).

B. The Facts of this Case

In January 1975, petitioners borrowed $70,000 from respondent's decedent (hereinafter "respondent") and gave him their promissory note for $77,000 that was secured by a mortgage on their home (Pet. App. A-1). After paying approximately $9,000 on the loan, petitioners defaulted and respondent brought suit for payment in the Tenth Judicial District Court for the Parish of Natchitoches, Louisiana (Pet. App. A-3). In response, petitioners claimed, *inter alia*, that respondent had violated the Truth in Lending Act by failing to disclose the existence of their right of rescission[3] and sought actual damages for the violation, as well as civil penalties and attorney's fees (Pet. App. A-1, A-37 to A-38). They also notified respondent that they were rescinding the transaction (Pet. App. A-3 to A-4). Upon receipt of petitioners' notice of rescission, respondent neither returned the payments petitioners had made on the loan, nor did he take any action to terminate his security interest in their home, as required by the Act, 15 U.S.C. 1635(b). Instead, he continued to prosecute his suit for payment (Pet. App. A-4). Petitioners never tendered the loan proceeds to respondent (Pet. App. A-20).

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[3]It is undisputed that the transaction is a consumer credit transaction subject to the rescission provisions of Section 1635, and that respondent made none of the disclosures required by the Truth in Lending Act.

The trial court dismissed respondent's suit against petitioners, rescinded the loan, cancelled respondent's security interest in petitioners' home, and ordered respondent to return to petitioners the loan payments they had made (Pet. App. A-27 to A-28). It also held that respondent forfeited the entire proceeds of the loan he had advanced to petitioners (Pet. App. A-31), and awarded petitioners $1,000 each in civil penalties for respondent's "failure to make the required disclosures," and $10,000 for attorney's fees (*ibid.*).

On respondent's appeal to the Louisiana Court of Appeal, Third Circuit, that court upheld the trial court's rulings ordering respondent to return to petitioners the payments they had made on the loan and to cancel his security interest in their home (Pet. App. A-24 to A-25). The court of appeal, however, reversed the trial court's holding that respondent forfeited the entire loan proceeds. It concluded that petitioners' failure to tender the loan proceeds made the forfeiture provision of Section 1635(b) inoperative (Pet. App. A-19 to A-20). It therefore ordered petitioners to tender to respondent the amount of the loan proceeds ($70,000) within 30 days of respondent's performance of his repayment and cancellation obligations and held that if respondent did not accept the tender within ten days, petitioners could keep the money (Pet. App. A-25).

The court of appeal also reversed the trial court's award in favor of petitioners of civil penalties and attorney's fees. It held that those claims were barred because they were not made within one year of respondent's failure to make the required disclosures, as required by 15 U.S.C. 1640(e) (Pet. App. A-20 to A-22).

DISCUSSION

1. *Forfeiture.* The decision below correctly held that under the Truth in Lending Act a creditor does not forfeit his

property to a rescinding consumer where the consumer fails to tender the property received from the creditor.

a. The Act provides that when a consumer in a credit transaction exercises his right to rescind, the creditor is required to return to the consumer all monies received and terminate any security interest arising from the credit transaction (15 U.S.C. 1635(b)). The consumer is thereupon required to tender the loan proceeds to the creditor. Neither Section 1635(b) nor Regulation Z (12 C.F.R. 226.9(d)) specifies the consequences arising from a creditor's failure to perform the duties Section 1635(b) requires on receipt of a rescission notice and the consumer's failure to tender the creditor's property. The courts, however, have held that where a creditor fails to comply with the requirements of Section 1635(b), the consumer can file an action for damages, civil penalties, and attorney's fees pursuant to Section 1640 of the Act.[4] *Gerasta* v. *Hibernia Nat'l Bank*, 575 F. 2d 580, 583 (5th Cir. 1978).

In ruling on consumers' separate claims to enforce their right to rescission pursuant to Section 1635, the courts have examined the underlying purpose of the statute in order to determine under what circumstances a creditor forfeits its property for failing to comply with the requirements of the section. That purpose is to return the parties to the *status*

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[4]Section 1640(a) provides a "remedy for a creditor's failure to comply with 'any requirement' imposed by certain provisions of the Act, including §1635." *Gerasta* v. *Hibernia Nat'l Bank*, 575 F. 2d 580, 583 (5th Cir. 1978).

The Truth in Lending Simplification and Reform Act amends Section 1640(a) to provide that a creditor is liable for failing to comply with any requirement imposed by the Act " 'including any requirement under section [1635]' " (Pub. L. No. 96-221, Section 615(b)(1), 94 Stat. 181), and amends Section 1640(c) to authorize the award of attorney's fees " 'in any action in which a person is determined to have a right of rescission under section [1635]' " (Pub. L. No. 96-221, Section 615(a)(2), 94 Stat. 180).

quo ante if the consumer elects to rescind within the time prescribed by the Act. Requiring the consumer to tender the creditor's property to trigger the forfeiture provision of Section 1635(b) "is the correct means to insure compliance with the congressional purpose of restoring the parties to the *status quo*." *Bustamante* v. *First Federal S. & L. Ass'n*, 619 F. 2d 360, 365 (5th Cir. 1980). Thus, the decision below requiring petitioners to tender the loan proceeds if respondent performs his repayment and cancellation obligations is entirely consistent with the purpose of the Act to restore the parties to their position prior to the loan transaction.

b. Contrary to petitioners' contention (Pet. 27), the decision below does not conflict with any other appellate court ruling. Rather, the federal courts of appeals have consistently declined to impose forfeiture upon the creditor to a rescinding consumer in the absence of a tender of the property to the creditor. For example, in *Sosa* v. *Fite*, 498 F. 2d 114 (5th Cir. 1974), upon which petitioners rely (Pet. 12-14), the consumer expressly offered to return the property at the time she notified the creditor of her intent to rescind the credit transaction but the creditor failed to respond to the offer (498 F. 2d at 118). As a result, the court held that the creditor had forfeited its property, noting that the consumer's "obligation to restore the creditor to the *status quo ante* was discharged by an offer accompanying notice of rescission * * *" (*id.* at 119).[5] The decisions of other

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[5]Petitioners erroneously characterize the reference in *Sosa* to the consumer's offer to return the property as "dicta" (Pet. 15). Indeed, in subsequent cases, the Fifth Circuit has emphasized that the decision in *Sosa* was based on the consumer's offer to return the property. See *Gerasta* v. *Hibernia Nat'l Bank*, *supra*, 575 F. 2d at 584.

Petitioners also cite (Pet. 17-18) two cases that have relied on *Sosa* v. *Fite*, for the proposition that a creditor forfeits its property to the consumer by failing to comply with Section 1635(b)'s requirements within ten days after receiving notice of rescission. In *Strader* v. *Beneficial Finance Co. of Aurora*, 551 P. 2d 720 (Colo. 1976), the Supreme

courts of appeals cited by petitioners are to the same effect. In each case, the courts invoked their equitable powers to condition rescission on the consumer's tender of the consideration received as a result of the credit transaction.[6]

Nor does the decision below conflict with the views of the staff of the Federal Reserve Board (Pet. 9-11). The 1975 unofficial staff interpretation relied on by petitioners (Pet. App. A-45)[7] did not directly address the question presented

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Court of Colorado held that the creditor forfeited loan proceeds to the consumers by failing to perform the duties imposed by a state statute similar to Section 1635(b). The court noted, however, that, as in *Sosa*, the consumers had tendered the creditor's property. 551 P. 2d at 726. Contra: *French* v. *Wilson*, 446 F. Supp. 216 (D. R.I. 1978). Although the district court in *French* cited *Sosa* as authority for imposing "the rather harsh legislative remedy" of forfeiture upon a creditor who failed to respond to a consumer's notice of rescission (*id.* at 220) we believe that it reached an erroneous result that is not supported by the facts of *Sosa*.

[6]Thus, in *Powers* v. *Sims & Levin*, 542 F. 2d 1216 (4th Cir. 1976) the consumers told the creditor they would not return all the consideration they received. The court, however, conditioned rescission on their tender of all the consideration, explaining that nothing in Section 1635 "limits the power of a court of equity to circumscribe the right of rescission to avoid the perpetration of stark inequity * * *" (542 F. 2d at 1221).

Similarly, in *Palmer* v. *Wilson*, 502 F. 2d 860 (9th Cir. 1974); *Ljepava* v. *M.L.S.C. Properties, Inc.*, 511 F. 2d 935 (9th Cir. 1975); and *LaGrone* v. *Johnson*, 534 F. 2d 1360 (9th Cir. 1976), the Ninth Circuit sanctioned decrees conditioning the grant of rescission (and the resulting loss of the creditors' security interest) on the consumers' tender of the loan proceeds, where the consumers appeared to be financially incapable of returning those proceeds after rescission. But see *Rachbach* v. *Cogswell*, 547 F. 2d 502 (10th Cir. 1976) (holding that in the absence of a trial transcript, the trial court's findings had to be accepted as true and that the district court did not abuse its discretion in refusing to condition rescission on the consumer's payment of the balance of the loan).

[7]The letter was an unofficial staff interpretation of Regulation Z (12 C.F.R. 226.9(d)), and thus is not entitled to the degree of deference accorded official staff opinions and interpretations. See *Ford Motor*

in this case.[8] Moreover, the Board's staff believes that a court, as in this case, has discretion to modify the rescission procedures of Section 1635(b) as long as the modification is consistent with the statutory purpose of restoring the *status quo ante*. If petitioners were permitted to keep the loan proceeds, have respondent's security interest cancelled, and recover all monies paid to respondent, the *status quo ante* would not be achieved. On the contrary, it would result in petitioners' unjust enrichment.

Finally, the decision in this case is also consistent with the recently enacted Truth in Lending Simplification and Reform Act. In that statute, Congress amended Section 1635(b) to provide that " '[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court.' "[9] Under the amended Section 1635(b), therefore, Congress expressly has authorized courts to exercise

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Credit Co. v. *Milhollin*, 444 U.S. 555 (1980). The Board's staff did not begin to issue official interpretations until August 1976, pursuant to the procedures established in 12 C.F.R. 226.1(d), which became effective on July 30, 1976 (41 Fed. Reg. 28256). We are advised by the Board that its staff issued only informal, unofficial letter opinions concerning the Act and Regulation Z and designated those it believed significant as Public Information Letters. The letter cited by petitioners was not so designated.

[8]The paragraph of the letter on which petitioners rely does not address the situation where, as here, the consumer seeks both to enforce this right to rescind and to keep the creditor's property without first tendering it. That situation is addressed in the succeeding paragraph of the letter, which suggests that the consumer may not be entitled to do so (Pet. App. A-46).

[9]Pub. L. No. 96-221, Section 612(a)(4), 94 Stat. 175.

The Senate Report accompanying the proposed legislation explained this provision as follows (S. Rep. No. 96-73, 96th Cong., 1st Sess. 15 (1979)):

> Upon application by the consumer or the creditor, a court is authorized to modify this section's procedures where appropriate. For example, a court might use this discretion in a situation where

the discretion they already have been exercising in determining how the parties to a rescinded credit transaction must satisfy their respective obligations. Hence, petitioners' forfeiture claim has no continuing importance under the Truth in Lending Act.

2. *Civil penalties and attorney's fees.* Petitioners further contend (Pet. 26-27) that the court below erred in failing to award them civil penalties and attorney's fees for respondent's failure to perform his repayment and cancellation obligations. Had they asserted that claim, petitioners might well have prevailed, because the Act provides for the award of civil penalties and attorney's fees for a creditor's failure to comply with the requirements in Section 1635(b) (see page 5, note 4, *supra*). Petitioners, however, appear to have based their claim for civil penalties and attorney's fees in the courts below only on respondent's failure to make the disclosures the Act requires and not on his failure to comply with his obligations under Section 1635(b) (Pet. App. A-37 to A-38). Accordingly, the trial court awarded each petitioner civil penalties "for [respondent's] failure to make the required disclosures" (Pet. App. A-31) and attorney's fees "as allowed by the Truth and [sic] Lending Law" (*ibid.*). Nothing in the opinion of the court of appeal suggests that petitioners advanced or that the court considered a new claim based on respondent's failure to perform his obligations under Section 1635(b). Rather, the court correctly held that the claim that petitioners had advanced in the trial court was barred by the one-year statute of limitations in

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a consumer in bankruptcy or wage earner proceedings is prohibited from returning the property. The committee expects that the courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required under the act.

Section 1640 (Pet. App. A-20 to A-22).[10] Since this Court does not "extend [its] review beyond those specific federal questions properly raised in the state court" (*Ker* v. *California*, 374 U.S. 23, 43-44 (1963)), there is no basis for review of petitioners' claim to civil penalties and attorney's fees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10]Petitioners apparently conceded in the court of appeal that their claim for civil penalties was barred by the statute of limitations (Pet. App. A-21).

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